Chong Hin Trading Co Sdn Bhd & Ors v Malayan Banking Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–327 OF 2001

ARIFIN ZAKARIA, MOHD GHAZALI MOHD YUSOFF JJCA AND JAMES FOONG J

7 JULY 2004

Civil Procedure — Summary judgment — Appeal — Summary judgment entered for amount claimed — Claim for penalty interest ordered to be tried — Whether summary judgment could be entered for plaintiff when there was dispute as to total sum claimable

Contract — Consideration — Past consideration — Whether fact that guarantee dated after letter of offer rendered contract of guarantee void for past consideration — Contracts Act 1950 s 80

Contract — Guarantee — Continuing guarantee — Whether letter of guarantee wide enough to exclude operation of past consideration

By a letter of offer dated 6 June 1996, the respondent granted to the first appellant a term loan facility. Pursuant to the letter of offer, the first appellant's directors ('the first and second appellants') were required to executed joint and several guarantees in favour of the respondent. The second and third appellants signed a letter of guarantee on 12 September 1996. Due to the first appellant default under the letter of offer, the respondent commenced action against the appellants and applied to enter summary judgment against them.

The learned senior assistant registrar found there were no triable issues and allowed the respondent to enter summary judgment for the sum of RM4,871,324.63 ('the judgment sum') and interest on that sum at 2.25%pa above the base lending rate then at 7.65%pa ('the prescribed rate') and penalty interest of 1% on the whole outstanding amount calculated on monthly rests from 1 July 1999 until the date of full settlement. On appeal to the judge in chambers, the learned judge affirmed the decision of the learned assistant registrar. He however ordered that the claim for penalty interest of 1% on the whole outstanding amount be tried for the reasons discussed earlier. The respondent did not appeal against that part of his decision.

The appellants appealed against the decision of the judge. The issues raised by the appellants in this appeal were whether: (a) summary judgment could be entered against the first appellant when there was a dispute as to the total sum claimable; and (b) the letter of guarantee was void and unenforceable due to the issue of 'past consideration' by virtue of s 80 of the Contracts Act 1950 ('the Act').

Held, dismissing the appeal:

(1) Order 14 r 3 of the Rules of the High Court 1980 stipulated that in an application for summary judgment, the court may give such judgment for the plaintiff against a defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed. As such, there was no merit to the appellants' contention that partial summary judgment ought not to have been entered against the first appellant since the penalty interest was held not claimable without proof of loss of use of fund. The respondent had satisfied all the considerations and had established a prima facie case against the appellants as far as the judgment sum and the interest at the prescribed rate were concerned. The appellants, on the other hand, had failed to satisfy the court on affidavit evidence that there was an issue or question in dispute which ought to be tried as far as the judgment sum and interest at the prescribed rate were concerned (see para 18).

(2) On the issue of whether the letter of guarantee was void and unenforceable due to the issue of 'past consideration' by virtue of s 80 of the Act, the fact that the letter of guarantee was dated 12 September 1996 and the letter of offer dated 6 June 1996 did not render the contract of guarantee void for past consideration. The monies under the said term loan facility were only disbursed on 1 October 1996. Under such circumstances, there can be no question of past consideration arising (see para 19).

(3) It cannot be said that the consideration was past purely based on the date of the letter of guarantee. In any case, the letter of guarantee read in its entirety contained expressions that were wide enough to exclude the operation of any past consideration. For example, the preamble which provided that 'In consideration of your having opened, opening or continuing an account with and having made, making or continuing to make advances loans or otherwise having given, giving credit or accommodation or granting lines to … at my/our request, for as long as you may at your sole discretion deem fit I/we … the undersigned hereby jointly and severally agree with and guarantee you as follows …'. Also, cl 5 of the letter of guarantee stipulated that the guarantee shall be a continuing guarantee (see paras 20–21).

(4) Further, the second and third appellants were not mere guarantors but were also the first appellant's directors. They were aware that the term loan facility was utilized after they had signed the letter of guarantee. That being the position, there was no way they can now turn around and contend that the contract of guarantee was invalid on the ground of past consideration when it was not (see para 24).

[Bahasa Malaysia summary

Melalui sepucuk surat bertarikh 6 Jun 1996, responden telah memberikan kepada perayu pertama satu kemudahan pinjaman bertempoh. Menurut surat

tawaran tersebut, pengarah-pengarah perayu pertama ('perayu-perayu pertama dan kedua') dikehendaki menyempurnakan jaminan-jaminan bersama dan berasingan memihak kepada responden. Perayu-perayu pertama dan ketiga telah menandatangani satu surat jaminan pada 12 September 1996. Akibat daripada kegagalan perayu pertama di bawah surat tawaran, responden telah memulakan tindakan terhadap perayu-perayu dan memohon untuk memasuki penghakiman terus terhadap mereka.

Penolong kanan pendaftar yang bijaksana mendapati tiada persoalan yang perlu dibicarakan dan membenarkan responden memasuki penghakiman terus untuk jumlah RM4,871,324.63 ('jumlah penghakiman') dan faedah atas jumlah tersebut pada 2.25% setahun berdasarkan kadar pinjaman asas yang ketika itu pada 7.65% setahun ('kadar yang ditetapkan') dan faedah penalti 1% atas keseluruhan baki jumlah dikira setiap bulan bermula 1 Julai 1999 hingga tarikh penyelesaian penuh. Semasa rayuan kepada hakim dalam kamar, hakim yang bijaksana telah mengesahkan keputusan penolong pendaftar yang bijaksana tersebut. Beliau bagaimanapun memerintahkan bahawa tuntutan untuk faedah penalti 1% atas keseluruhan baki jumlah tersebut dibicarakan atas alasan-alasan yang dibincangkan sebelum ini. Responden tidak membuat rayuan terhadap bahagian keputusan beliau itu.

Perayu-perayu telah membuat rayuan terhadap keputusan hakim. Persoalan-persoalan yang ditimbulkan oleh perayu-perayu dalam rayuan ini adalah sama ada: (a) penghakiman terus boleh dimasuki terhadap perayu pertama apabila terdapat pertikaian berhubung keseluruhan jumlah yang boleh dituntut; dan (b) surat jaminan adalah terbatal dan tidak boleh berkuat kuasa akibat persoalan 'past consideration' menurut s 80 Akta Kontrak 1950 ('Akta tersebut').

Diputuskan, menolak rayuan tersebut:

(1) Aturan 14 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 memperuntukkan bahawa dalam satu permohonan untuk penghakiman terus, mahkamah boleh memberikan penghakiman sedemikian kepada plaintif terhadap defendan berdasarkan tuntutan atau sebahagian daripadanya sebagaimana yang difikirkan adil dengan mengambil kira sifat remedi atau relief yang dituntut. Oleh itu, tiada merit terhadap hujah perayu-perayu bahawa sebahagian penghakiman terus tidak patut dimasuki terhadap perayu pertama tanpa bukti kehilangan menggunakan dana tersebut. Responden telah memenuhi semua kehendak dan telah membuktikan kes prima facie terhadap perayu-perayu setakat mana jumlah penghakiman dan faedah pada kadar yang ditetapkan adalah berkaitan. Pihak perayu, sebaliknya, telah gagal untuk memuaskan mahkamah atas keterangan afidavit bahawa terdapat satu persoalan yang dipertikaikan yang perlu dibicarakan setakat mana jumlah penghakiman dan faedah pada kadar yang ditetapkan adalah berkaitan (lihat perenggan 18).

(2) Berhubung persoalan sama ada surat jaminan tersebut adalah terbatal dan tidak berkuat kuasa disebabkan persoalan 'past consideration' menurut s 80 Akta tersebut, fakta bahawa surat jaminan tersebut bertarikh 12 September 1996 dan surat tawaran bertarikh 6 Jun 1996 tidak mengakibatkan kontrak jaminan tersebut terbatal kerana balasan lampau. Wang di bawah kemudahan pinjaman bertempoh hanya dibayar pada 1 Oktober 1996. Di bawah keadaan sedemikian, tiada persoalan tentangh balasan lampau yang timbul (lihat perenggan 19).

(3) Tidak boleh dikatakan bahawa balasan tersebut adalah lampau semata-mata berdasarkan tarikh surat jaminan tersebut. Dalam apa keadaan, surat jaminan dibaca secara keseluruhan mengandungi ungkapan-ungkapan yang luas untuk merangkumi operasi apa-apa balasan lampau. Sebagai contoh, mukadimah yang memperuntukkan bahawa 'In consideration of your having opened, opening or continuing an account with and having made, making or continuing to make advances loans or otherwise having given, giving credit or accommodation or granting lines to … at my/our request, for as long as you may at your sole discretion deem fit I/we … the undersigned hereby jointly and severally agree with and guarantee you as follows …'. Juga, kl 5 surat jaminan memperuntukkan bahawa jaminan tersebut hendaklah merupakan satu jaminan berterusan (lihat perenggan 20–21).

(4) Tambahan pula, perayu-perayu kedua dan ketiga bukan hanya penjamin semata-mata tetapi juga salah pengarah-pengarah perayu pertama. Mereka sedar bahawa kemudahan pinjaman bertempoh tersebut digunakan selepas mereka menandatangani surat jaminan. Dalam keadaan sedemikian, mereka tidak boleh berpaling sekarang dan berhujah bahawa kontrak jaminan tersebut tidak sah atas alasan balasan lampau walhal ia tidak sedemikian (lihat perenggan 24).]

Notes

For cases on appeals against summary judgments, see 1 *Mallal's Digest* (4 th Ed, 2001 Reissue) paras 5726–5775.

For cases on past consideration, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2689–2695.

For cases on past continuing guarantee, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3406–3412.

Cases referred to

Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership) [1996] 2 MLJ 461 (refd)

Legislation referred to

Companies Act 1965 ss 132, 167, 169
Contracts Act 1950 ss 75, 80
Rules of the High Court 1980 O 14 r 3

Appeal from: Civil Suit No D3–22–3559 of 1998 (High Court, Kuala Lumpur)

CY Chong (CY Chong & Assoc) for the appellants.
Ramesh Sanghvi (Kassim Tadin, Wai & Co) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court):

[1] By letter of offer dated 6 June 1996, the respondent, a local bank offered to the first appellant, a locally incorporated company a term loan facility as requested by the latter for the sum of RM7,629,643 to fully finance its quest to take up the rights issue of 3,051,857 shares of a public company named A & M Realty Bhd on the terms and conditions therein set out. The first appellant accepted the offer. The terms and conditions set out in the said letter of offer included the following:

(a) as security, the respondent required the following:
   (i) a pledge of 763,000 shares of RM1 each in A & M Realty Bhd plus 3,051,857 of the same shares from the rights issue;
   (ii) a pledge of 100,000 shares of RM1 each in HIL Industries Bhd;
   (iii) joint and several guarantees of the second and third appellants, directors of the first appellant, for the sum of RM7,629,643;

(b) that the interest rate shall be at base lending rate (which was then 8.80%pa) plus 2.25%pa and that the interest rate may be varied at any time at the respondent's discretion;

(c) that interest charged should be settled before the end of the following month; without prejudice to any other right of the respondent, the respondent may debit the first appellant's account with the interest charged and impose a penalty interest of 1%pa or such higher rate as shall be imposed by the respondent at any time from time to time above the prescribed rate on any late payment or instalment with minimum of RM1.

[2] The first appellant confirmed the acceptance of all the terms and conditions contained in the said letter of offer. The second and third appellants, as authorised signatories, affixed their signatures to that letter ('the said agreement'). The second and third appellants executed a letter of guarantee on 12 September 1996 and the respondent consequently released the monies under the said term loan facility to the first appellant on 1 October 1996. The first appellant subsequently defaulted.

[3] By separate letters of demand dated 10 August 1998 the respondent's solicitors demanded from the appellants the sum of RM8,064,037.72 being the amount due as at 31 July 1998. Since there was no response, the respondent, by writ dated 30 September 1998 claimed from the appellants the said sum of RM8,064,037.72 outstanding as at 31 July 1998 with interest at 2.25%pa above the base lending rate (which was

then 11.40% pa) and an additional 1% penalty interest on the whole outstanding amount calculated on monthly rests till date of full settlement.

[4] On 19 March 1999, the respondent filed an application for summary judgment. Subsequent to the filing of the application for summary judgment, the respondent exercised its right to dispose off the pledged shares and applied the proceeds towards reducing the amount owing by the first appellant. The reduced amount then due, as at 30 June 1999, was RM4,871,324.63 and this was the amount that the respondent claimed in its application for summary judgment against the appellants.

[5] On 30 September 1999, the learned senior assistant registrar allowed the respondent's application to enter summary judgment for the said sum of RM4,871,324.63 and interest on that sum at 2.25%pa above the base lending rate then at 7.65%pa and penalty interest of 1% on the whole outstanding amount calculated on monthly rests from 1 July 1999 till date of full settlement. The appellants appealed to the judge in chambers.

[6] On 1 March 2001, the learned judge dismissed the appeal in relation to the said sum and interest claimed, viz, he affirmed the decision of the learned senior assistant registrar that summary judgment be entered against the appellants for the said sum of RM4,871,324.63 and interest on that sum at 2.25%pa above the base lending rate then at 7.65%pa. He however ordered that leave be given to the appellants to defend upon the issue of the 1% penalty interest claimed as he was of the view that that was a triable issue; the following was what he said in his grounds of decision:

> Since the issues raised are purely legal in nature, and do not involve findings upon disputed facts, there is no reason to set aside the entire order of the learned Senior Assistant Registrar. I am satisfied the only triable issue is on the question of what is the actual damage suffered by the plaintiff as a result of the default, and not in respect of the principal sum and interest defaulted upon. Now O 14 r 3 of the Rules of the High Court provides that the Court may allow partial judgment to be entered in an O 14 application. Mindful of the fact the issue and the remedy of actual damage suffered is entirely separate from the issue of principal and interest due under the loan, I would vary the order of the learned Senior Assistant Registrar by deducting therefrom the penalty interest of 1% and order that leave is given to the defendants to defend upon the issue of actual damage suffered by the plaintiff as a result of the default.

[7] The appellants raised two issues before the learned judge, namely:

(a) whether penalty interest is contrary to s 75 of the Contracts Act 1950;

(b) whether in view of s 80 of the Contracts Act 1950, the guarantee is null and void, the loan being past consideration.

[8] Section 75 of the Contracts Act 1950 ('the Act'), entitled 'Compensation for breach of contract where penalty stipulated for', inter alia, reads:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled,

whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation — A stipulation for increased interests from the date of default may be a stipulation by way of penalty.

ILLUSTRATIONS

(a) A contracts with B to pay B $1,000, if he fails to pay B $500 on a given day. A fails to pay B $500 on that day, B is entitled to recover from A such compensation, not exceeding $1,000, as the court considers reasonable.

(d) A gives B a bond for the repayment of $1,000 with interest at 12 per cent, at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent, from the date of the default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the court considers reasonable.

(f) A undertakes to repay B a loan of $1,000 by five equal monthly instalments, with a stipulation that, in default of payment of any instalment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.

(g) A borrow $100 from B and gives him a bond for $200 payable by five yearly instalments of $40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

[9] Section 80 of the Act, entitled 'Consideration for guarantee', reads:

Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee.

ILLUSTRATIONS

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. This is a sufficient consideration for C's promise.

(b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

(c) A sells and delivers good to B. C afterwards, without consideration, agrees to pay them in default of B. The agreement is void.

[10] With regards to the first issue, viz., the penalty interest of 1%, cl 6 of the said agreement under the sub-heading entitled 'Other terms and conditions' reads:

Interest charged should be settled before the end of the following month. Without prejudice to any other right of the Bank, the Bank may debit your Account with the interest charged and impose a penalty of interest of 1%pa or such higher rate as shall be imposed by the Bank at any time from time to time above the prescribed rate on any late payment or instalment with minimum of RM1.00.

[11] It was the stand of the appellants that such default interest was caught by s 75 of the Act, viz, it was a penalty and therefore irrecoverable. In his grounds of decision, the learned judge dealt at length with this issue and in relation to this referred to *Realvest Properties Sdn Bhd v Co-operative Central Bank Ltd (In receivership)* [1996] 2 MLJ 461 wherein the Federal Court had occasion to consider the application of s 75 of the Act, viz, whether the charging of additional interest by a bank, which in the case was a co-operative society, for default by a borrower is caught by s 75. In that case, cl 3.1 of the annexure to the instrument of charge provides interest on the loan was prescribed at the rate of 14.75%pa on monthly rests. Clause 3.2 of the annexure provides in the event that any amount due, whether of principal or interest, was not received on the due date, 'the chargor shall pay interest at the rate of one and one-third (11/3) times the normal ruling rate of interest on the sum in arrears calculated retrospectively from the due date of such default until the date of payment of the amount thereof', ie, the additional interest. The chargor defaulted and the co-operative society, as chargee of the land charged, obtained a statutory order for sale. The chargor appealed against the order of sale and one of the grounds canvassed was that the co-operative society had charged additional interest on the sum in arrears, which comprised principal and capitalized interest, pursuant to the said cl 3.2 in addition to the interest calculated by means of the prescribed rate of interest pursuant to the said cl 3.1 payable before such default and continuing to be payable after such default and this amounted to a penalty which was irrecoverable under s 75. The Federal Court held that the said cl 3.2 was void and unenforceable by virtue of s 75 and the interest calculated by virtue of cl 3.2 was irrecoverable. The Federal Court also held:

(a) if a sum is named in the contract or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or the penalty stipulated for;

(b) default interest may or may not be a penalty depending on circumstances and that the provision of default interest would still be interpreted according to common law as to whether it is liquidated damages or a penalty subject to provisions of written law in section 75.

[12] In the instant case, the learned Judge was of the view that in all the circumstances the evidence is clear that the default interest is a separate payment in addition to the interest rate otherwise prevailing upon the loan at the time of default and as a penalty interest, the effect of s 75 is to require the plaintiff to prove his damages and the penalty interest of 1% operates as the upper limit that may be claimed as damages. The learned judge then went on to say that the respondent however must prove the damages that it suffered, the established measure for which is the damages for the loss of use of the fund or money. As such he ordered that leave be given to the appellants to defend upon the issue of 'actual damage' suffered by the respondent as a result of the default. The respondent did not cross-appeal against this part of his decision.

[13] On the second issue canvassed before him, viz., whether in view of s 80 of the Act, the guarantee is null and void, the loan being past consideration, the second and third appellants relied on illustration (c) of s 80, namely, they signed the letter of guarantee on 12 September 1996 whereas the loan agreement was made on 6 June 1996.

[14] Section 80 of the Act provides anything done, or any promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee and illustration (c) reads:

> (c) A sells and delivers good to B. C afterwards, without consideration, agrees to pay them in default of B. The agreement is void.

[15] In relation to this issue, the learned judge said :

> It is obvious therefore that to determine the rights of the parties it is necessary to look into the specific terms of the guarantee. The letter of guarantee in this case clearly states:
>
> > 'In consideration of you having opened, opening or continuing an account with and having made, making or continuing to make advances, loans or otherwise having given, giving credit or accommodation or granting time to CHONG HIN TRADING COMPANY ... (hereinafter called "the Customer") ... The undersigned hereby jointly and severally agree with and guarantee you as follows:
> >
> > 1 I/We will pay you on demand:
> >
> > (i) all moneys which now are or may during the operation of this guarantee be owing to you from the Customer or remain unpaid on the general balance of the Customer's account with you ...'

The ground that the second and the third defendants signed the letters of guarantee on 12/9/96 when the loan agreement was made on 6/6/96 is incomplete in that it fails to take into account that the loan was disbursed on 1/10/96, that is, after the memorandum of charges and the letter of guarantee was signed by the principal debtor and by the second and third defendants respectively; and in particular, although the transaction seem to suggest that the guarantee is a one-off guarantee and not a continuing guarantee as defined in section 82, the guarantee did not in fact commit to guaranteeing the sums of the sum remaining unpaid from that single loan. The letter of offer date 6/6/96 which was accepted by the first defendant contained a specific conditions(*sic*) requiring pledges of shares and the joint and several guarantee of the second and the third defendants. The agreement with conditions yet to be performed cannot be termed as a past consideration within the meaning of illustration (c) of section 80 where the execution of the guarantee is itself a pre-condition for the performance of the loan by the plaintiff by the release of the loan on 1/10/96. The series of events is one single transaction, event(*sic*) when considered on a strictly chronological view. Indeed in *South East Asia Insurance Bhd v Nasir Ibrahim* [1992] 2 MLJ 355 (SC) it was held by the Supreme Court that the Court ought not take a strictly chronological view. In *Perwira Habib Bank Malaysia Bhd v MET Sdn Bhd & 3 Ors* [1988] 2 CLJ 480 an appeal in a case where guarantees were signed after approval of an overdraft facility but before the first drawdown was held to be valid. See also *Sabah Bank Berhad v Ho Juan Hua & Anor* [1993] 3 MLJ 113; *Perwira Habib Bank Malaysia Bhd v Saiyo Sdn Bhd & 2 Ors* [1991] 3 CLJ 1849; *D & C Bank*

Bhd v Syarikat Farmco Sdn Bhd & Ors [1988] 3 MLJ 275. I do not therefore find the second objection to be of substance and I would reject it. A

[16] Before us, the appellants' counsel, in his written outline submission, restricted the appeal to the following issues:

(a) whether summary judgment could be entered against the first appellant when there is a dispute as to the total sum claimable; B

(b) whether the letter of guarantee is void and unenforceable due to the issue of 'past consideration' by virtue of s 80 of the Act.

[17] On the first issue posed, the appellants' counsel contended since the sum as penalty interest out of the total sum claimed was held not claimable without proof of loss of use of fund, there is dispute as to the total amount which the respondent was entitled to recover. As such, partial summary judgment ought not to have been entered against the first appellant. C

[18] We cannot see any merit in the above contention. Order 14 r 3 of the Rules of the High Court 1980 ('the RHC') provides in an application for summary judgment the court may give such judgment for the plaintiff against a defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed. The purpose of O 14 of the RHC is to enable a plaintiff to obtain summary judgment without trial if he can prove his case clearly. The respondent here had satisfied all the considerations and have established a prima facie case against the appellants as far as the said sum of RM4,871,324.63 and interest on that sum at 2.25%pa above the base lending rate then at 7.65%pa were concerned. The appellants had failed to satisfy the court on affidavit evidence that there is an issue or question in dispute which ought to be tried as far as that said sum and that interest is concerned and that being the case, we do not see why this part of the application for summary judgment should be refused. We cannot find any reason why these matters should go formally to trial where no further facts could emerge as far as that part of the claim is concerned. D E F

[19] On the second issue posed, viz, whether the letter of guarantee is void and unenforceable due to the issue of 'past consideration' by virtue of s 80 of the Act, we find that the learned judge had dealt at length with this issue, as discussed above, and we cannot find anything erroneous with his decision. The fact that the letter of guarantee was dated 12 September 1996 and that the said agreement was dated 6 June 1996 does not render the contract of guarantee to be void for past consideration. The second and third appellants knew that as security for the said term loan facility, the respondent required, inter alia, joint and several guarantees from their goodselves as directors of the first appellant, for the sum of RM7,629,643. That was clear from the said letter of offer. It was the second and third appellants, as directors of the first respondent and as authorised signatories, who affixed their signatures to the said letter of offer confirming the acceptance of all the terms and conditions contained therein. They did not G H I

even bother to date it. The evidence showed that the respondent received the signed letter of offer from the appellants on 13 June 1996. The letter of guarantee was dated 12 September 1996 but then, the monies under the said term loan facility were only disbursed on 1 October 1996. Under such circumstances, we cannot see how there can be a question of past consideration arising.

[20] The second and third appellants were fully aware that they were required to execute a contract of guarantee, being one of the securities required by the respondent as clearly spelt out in its letter of offer. As directors of the first appellant, the second and third appellants were aware that the monies under the said term loan facility were released after they signed the letter of guarantee. It cannot be said that the consideration was past purely based on the date when contract of guarantee was executed. We would agree with the submission of the respondent's counsel that the letter of guarantee read in its entirety contained expressions that are wide enough to exclude the operation of any past consideration. The preamble to the letter of guarantee is explicit in its terms and effect; it reads:

> In consideration of your having opened, opening or continuing an account with and having made, making or continuing to make advances loans or otherwise having given, giving credit or accommodation or granting lines to CHONG HIN TRADING SDN BHD of No 4 Jalan Istana, 41000 Klang, Selangor Darul Ehsan (hereinafter called 'the Customer') at my/our request, for as long as you may at your sole discretion deem fit I/We LEM LEE SIANG @ LIM LEE CHENG (IC No 0543612) & LIM SIW CHENG (I/C No 0543611) the undersigned hereby jointly and severally agree with and guarantee you as follows …

[21] Clause 5 of the letter of guarantee clearly stated that the guarantee shall be a continuing guarantee; it reads:

> This Guarantee shall be a continuing guarantee to you to the extent of Ringgit Malaysia Seven Million Six Hundred and Twenty Nine Thousand Six Hundred and Forty Three (RM7,629,643) for the purpose of securing not merely an equivalent amount but (subject always to the said limit of Malaysian Ringgit 7,629,643) the whole of the moneys or general balance in Clause 1 hereof mentioned notwithstanding any such payments receipts or dividends as are hereinbefore mentioned with interest on the sum claimable from me/us at the rate which is levied on the Customer from time to time from the date of my/our receiving demand for payment thereof.

[22] Upon perusing the terms found in the letter of guarantee, we find that the second and third appellants have categorically guaranteed and undertook to pay all monies due and owing by the first appellant to the respondent when they executed the guarantee. It is not denied that the first appellant defaulted on the loan repayments due under the term loan facility.

[23] The learned senior assistant registrar found there were no triable issues and allowed the respondent to enter summary judgment for the said sum of RM4,871,324.63 and interest on that sum at 2.25%pa above the base lending rate then at 7.65%pa and penalty interest of 1% on the whole

outstanding amount calculated on monthly rests from 1 July 1999 till date of full settlement. On appeal to the judge in chambers, the learned judge affirmed the decision of the learned assistant registrar. He however ordered that the claim for penalty interest of 1% on the whole outstanding amount be tried for the reasons discussed earlier. The respondent did not appeal against that part of his decision.

[24] We cannot find anything erroneous with the decision of the learned judge. The fist appellant had utilized the term loan facility upon the monies being released on 1 October 1996. Neither the second nor the third appellant since then had ever protested to the respondent that the letter of guarantee was invalid. They only did so after the writ was filed. Provisions under the Companies Act 1965 would compel them, as directors, to see that the accounts of the first appellant are annually drawn up, audited and tabled before the annual general meeting of the company. From the accounts, they would be in a position to see the existence of the amount of outstanding debt due under the said term loan facility. Section 132 of the Companies Act 1965 ('the Companies Act') require a director to act honestly and use reasonable diligence in the discharge of the duties of his office. Section 167 of the Companies Act require every company and the directors and manager thereof to keep such accounting and other records as will sufficiently explain the transactions and financial position of the company and enable true and fair profits and loss accounts and balance sheets to be prepared and kept as to enable them to be conveniently and properly audited. Section 169 of the Companies Act require the directors to lay before the company at its annual general meeting a duly audited profit and loss account and the balance sheet. The second and third appellants are not mere guarantors but are also directors of the first appellant and that being the position, we cannot see how they can turn around and contend that the contract of guarantee was invalid on the ground that consideration was past when it was not. It is clear that as directors of the first appellant, they have executed an independent collateral guarantee in which they guaranteed, inter alia, that they will pay on demand all monies which 'now are or may during the operation of this guarantee' be owing to the respondent from the first appellant or remain unpaid on the general balance of the first appellant's account with the respondent. It is not denied that the first appellant defaulted on the term loan repayments due and that the action is now brought against the first appellant and the second and third appellants as joint and several guarantors. Under the circumstances discussed above, we cannot see how the second and third appellants can absolve liability by asserting the invalidity of the contract of guarantee.

[25] We found that the claim against the appellants on the said sum claimed and interest is a plain case and ought not to go for trial. The purpose of O 14 of the RHC is to enable a plaintiff to obtain summary judgment without trial if he can prove his case clearly. The respondent has satisfied all the considerations and have established a prima facie case

against the appellants. We cannot see why the application for summary judgment should be refused neither can we see what can be achieved if the matter between the respondent and the appellants go for trial. For the reasons above, we dismissed this appeal with costs and ordered that the deposit be paid to the respondent towards account of taxed costs.

Appeal dismissed.

Reported by Lim Lee Na